Ramely bin Mansor v Suruhanjaya Pilihanraya Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — ELECTION PETITION NO PP–2 OF 2000
AUGUSTINE PAUL J
4 APRIL 2000

Election *— Petition — Service — Whether election petition to be served on Election Commission and returning officer — Election Petition Rules 1954 r 15*

Election *— Petition — Service — Candidate returned leaving no address for service — No copies of petition left at registrar's office within prescribed 15-day period — Copies of petition only made available outside 15-day period — Whether 15-day period for service of petition mandatory and applies to all modes of service — Whether service of petition on such returned candidate may be deemed — How service on such candidate to be deemed*

Election *— Petition — Service — Candidate returned leaving no address for service — Extra copies of petition returned by court to petitioner — Statutory obligation on petitioner to leave two copies of petition with court — Whether petitioner duty bound to inform court of statutory requirement — Whether return of extra copies by court absolved petitioner from ensuring sufficient copies were left with registrar for service*

Election *— Petition — Service — Copies of petition left with court after prescribed mandatory 15-day period — Whether defect curable — Whether election petition had become nullity by reason of failure to serve within prescribed period — Whether petition ought to be dismissed*

The petitioner in this election petition had cast his vote for the Parliamentary constituency of Wangsa Maju during the general election on 20 November 1999. The first and second respondents were respectively the Election Commission and the returning officer. The third respondent was the returned candidate. The petitioner presented his petition at the registry of the High Court Kuala Lumpur on 10 February 2000 together with four copies of the petition. The High Court retained the petition but returned the four copies to the petitioner. As the returned candidate had not complied with r 10, the petitioner attempted to effect service of the petition by way of advertisement in The Star Newspaper on 21 and 22 February 2000. The respondents tried to obtain a copy o f the petition from the High Court registry by 25 February 2000 but were informed that the petitioner had not left any copies to be given to the respondents. The High Court registry duly informed the petitioner about the absence of the copies in the court file and was furnished with copies of the same though after the 15-day period under r 15 of the Election Petition Rules 1954 ('the rules'). The respondents thus applied to have the petition dismissed on the ground that there was no proper service. The High Court had to, inter alia, consider: (i) the proper manner of effecting service of an election petition on a returned candidate when he has not availed himself of r 10 of the rules; (ii) the effect of the

petitioner's failure to leave a copy of the petition with the court to be handed to the third respondent after he had published the notice stating that the petition had been presented; and (iii) whether the petitioner had discharged his responsibility by filing the four additional copies of the petition with the court.

Held, striking out the first and second respondents as parties and dismissing the petition against the third respondent:

(1) Rule 15 of the rules is only confined to service of election petitions on returned candidates with the result that the argument of the first and second respondents that there had been no compliance with r 15 in the service of the petition on them did not merit consideration. The first and second respondents should therefore be struck out as parties (see p 556B–C).

(2) The 15-day period for service of the petition is mandatory and applies to all modes of service specified in r 15. The petition shall be deemed to have been served on the fifteenth day after presentation of the petition even though the respondent has not collected the copy. However, this deeming effect is subject to the important implicit qualification that is a copy of the petition must have been made available with the registrar for handing over to the respondent. There must be proof of the basic fact that a copy of the petition had been left with the registrar within the prescribed period before it can be deemed to have been served on the respondent (see pp 556I–557E).

(3) The responsibility of ensuring that a copy of the petition was left with the court for service on the respondent was that of the petitioner even though the additional copies were returned to him. Rule 3(2) of the rules imposes a statutory obligation on the petitioner to leave two copies of the petition with the court. The words '... shall also be left ...' in r 3(2) of the rules show that it was the obligation of the petitioner to leave the two copies with the court. It was his duty to inform the court at the time of filing the petition of the requirement to leave the two copies with the court. Counsel for the petitioner ought to have returned the copies to the court in view of the mandatory requirement in r 3(2). The return of the four copies of the petition by the High Court in the regular performance of its duties, did not absolve the petitioner of ensuring that the required number of copies were returned to the registrar to enable the respondent to collect it. The result was that the respondent had not been served with the petition as a copy thereof was not available at the High Court registry for collection by the third respondent at the expiry of the 15-day period (see pp 557E–H, 558B–C).

(4) The fact that the petitioner had made copies available to the court after the expiry of the 15-day period did not cure the defect as the time period is mandatory. The court has an inherent power to

dismiss an election petition which has become a nullity by failure to serve it within the prescribed time and accordingly the petition was dismissed (see p 558C–D).

[Bahasa Malaysia summary

Pempetisyen di dalam petisyen pilihanraya telah membuat undian beliau untuk kawasan pilihanraya Parlimen Wangsa Maju sewaktu pilihanraya umum pada 20 November 1999. Responden-responden pertama dan kedua masing-masing adalah Suruhanraya Pilihanraya dan pegawai pilihanraya. Responden ketiga adalah calon pilihanraya ynag menang ('calon pilihanraya tersebut'). Pempetisyen telah mengemukakan petisyen beliau kepada pendaftar Mahkamah Tinggi Kuala Lumpur pada 10 Februari 2000 bersama dengan empat salinan petisyen tersebut. Mahkamah Tinggi menyimpan petisyen tersebut tetapi memulangkan keempat-empat salinan petisyen tersebut kepada pempetisyen. Memandangkan calon pilihanraya tersebut tidak mematuhi k 10, pempetisyen telah mencuba untuk melaksanakan penyampaian petisyen tersebut melalui iklan di dalam *The Star Newspaper* pada 21 dan 22 Februari 2000. Responden-responden telah cuba mendapatkan sesalinan petisyen tersebut daripada pendaftar Mahkamah Tinggi menjelang 25 Februari 2000 tetapi telah dimaklumkan bahawa pempetisyen tidak meninggalkan apa-apa salinan untuk diberikan kepada responden-responden tersebut. Pendaftar Mahkamah Tinggi memaklumkan kepada pempetisyen seperti sepatutnya tentang ketiadaan salinan-salinan tersebut di dalam fail mahkamah dan telah diberikan salinan-salinan tersebut walau bagaimanapun selepas tempoh 15-hari di bawah k 15 Kaedah-Kaedah Petisyen Pilihanraya 1954 ('kaedah-kaedah tersebut'). Responden-responden oleh itu telah memohon agar petisyen tersebut ditolak atas alasan bahawa tiada penyampaian betul. Mahkamah Tinggi terpaksa mempertimbangkan antara lain: (i) kaedah betul untuk melaksanakan penyampaian suatu petisyen pilihanraya ke atas seorang pegawai pilihanraya apabila beliau sendiri tidak mempergunakan k 10 kaedah-kaedah tersebut; (ii) akibat daripada kegagalan pempetisyen untuk meninggalkan sesalinan petisyen tersebut dengan mahkamah untuk diserahkan kepada responden ketiga setelah beliau menyiarkan notis yang menyatakan bahawa petisyen tersebut telahpun dikemukakan; dan (iii) sama ada pempetisyen telah melepaskan tanggungjawab beliau dengan memfailkan empat salinan tambahan petisyen tersebut kepada mahkamah.

Diputuskan, membatalkan responden-responden pertama dan kedua sebagai pihak-pihak dan menolak petisyen tersebut terhadap responden ketiga:

(1) Kaedah 15 kaedah-kaedah tersebut hanya terbatas kepada penyampaian petisyen pilihanraya ke atas pegawai pilihanraya dengan keputusan bahawa hujahan responden-responden

pertama dan kedua bahawa terdapat ketidakpatuhan dengan k 15 di dalam penyampaian petisyen tersebut ke atas mereka tidak memeritkan pertimbangan. Responden-responden pertama dan kedua oleh demikian sepatutnya dibatalkan sebagai pihak-pihak (lihat ms 556B–C).

(2) Tempoh 15 hari untuk penyampaian petisyen tersebut adalah mandatori dan terpakai kepada semua kaedah-kaedah penyampaian yang dispesifikasikan dalam k 15. Petisyen tersebut hendaklah dianggap telah disampaikan pada hari ke-15 selepas petisyen tersebut dikemukakan walaupun responden tidak mengambil salinan tersebut. Namun begitu, kesan anggapan ini adalah tertakluk kepada syarat tersirat yang penting di mana satu salinan petisyen tersebut harus ada dengan pendaftar untuk diberikan kepada responden. Seharusnya terdapat bukti fakta asas bahawa satu salinan petisyen tersebut telah ditinggalkan dengan pendaftar di dalam tempoh yang ditetapkan sebelum ia dianggap sebagai telah disampaikan ke atas responden (lihat ms 556I–557E).

(3) Tanggungjawab untuk memastikan bahawa satu salinan petisyen tersebut telah ditingglkan di mahkamah untuk penyampaian ke atas responden terletak pada pempetisyen walaupun salinan tambahan tersebut tel;ah dipulangkan kepada beliau. Kaedah 3(2) kaedah-kaedah tersebut mengenakan satu obligasi statutori atas pempetisyen untuk meninggalkan dua salinan petisyen tersebut dengan mahkamah. Perkataan-perkataan '... hendaklah juga ditinggalkan ...' dalam k 3(2) kaedah-kaedah tersebut menunjukkan bahawa ia adalah obligasi pempetisyen untuk meninggalkan dua salinan tersebut dengan mahkamah. Peguam bagi pihak pempetisyen sepatutnya memulangkan salinan-salinan tersebut kepada mahkamah dengam mengambil kira keperluan mandatori dalam k 3(2). Pemulangan keempat-empat salinan petisyen tersebut oleh Mahkamah Tinggi di dalam pelaksanaan biasa tugasnya, tidak membebaskan pempetisyen daripada memastikan bahawa bilangan salinan-salinan yang dihendaki dikembalikan kepada pendaftar untuk membolehkan responden mengambilnya. Akibat daripada itu responden tidak diserahkan dengan petisyen tersebut kerana satu salinan tersebut tidak terdapat di pendaftar Mahkamah Tinggi untuk diambil oleh responden ketiga pada tempoh luput 15 hari tersebut (lihat ms 557E–H, 558B–C).

(4) Hakikat bahawa pempetisyen telah membuat salinan untuk mahkamah setelah tempoh luput 15 hari tidak memulihkan kecacatan kerana tempoh masa adalah mandatori. Mahkamah mempunyai kuasa sedia ada untuk menolak suatu petisyen pilihan raya yang telah menjadi tidak sah disebabkan oleh kegagalan untuk menyampaikannya di dalam masa yang ditetapkan dan sewajarnya petisyen tersebut ditolak (lihat ms 558C–D).]

Notes

For cases on service of election petition, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1558–1559.

Cases referred to

Devan Nair v Yong Kuan Teik [1967] 1 MLJ 261 (refd)
Dr Lee Chong Meng v Returning Officer, Abdul Rahman bin Haji Abdullah & Ors (Election Petition No PP-1-2000) (No 1) (refd)
Harcharan Singh v Mohinder Singh AIR 1968 SC 1500 (refd)
Hugh Siak Meng & Anor v Daing Ibrahim [1975] 4 MC 275 (refd)
Ponnuswami v Returning Officer, Nammakkal Constituency [1952] SCR 218 (refd)
Tengku Korish v Mohamed bin Jusoh & Anor [1970] 1 MLJ 6 (refd)

Legislation referred to

Election Petition Rules 1954 rr 3(2), 10, 15
Rules of the High Court 1980

Zainur bin Zakaria (*Zainur Zakaria & Co*) for the petitioner.
Badariah bte Hassan (Senior Federal Counsel, Election Commission Malaysia) for the first and second respondents.
Shahul Hameed Amirudin (*Khairuzzaman Muhammad* with him) (*Zul Rafique & Partners*) for the third respondent.

Augustine Paul J: The central issue for determination in this motion is the proper manner of effecting service of an election petition on a returned candidate when he has not availed himself of r 10 ('r 10') of the Election Petition Rules 1954 ('the Rules').

The petitioner is Ramely bin Mansor ('the petitioner') who had cast his vote for the Parliamentary constituency of Wangsa Maju in the Federal Territory during the general election held on 29 November 1999. The candidates for the constituency were Zulhasnan bin Rafique and Marina bte Mohd Yusof. Zulhasnan bin Rafique was duly elected. The result was gazetted on 20 January 2000. The respondents to the petition are the Election Commission ('the commission'), the returning officer and the returned candidate. The petitioner presented his petition at the registry of the High Court Kuala Lumpur on 10 February 2000 together with four copies of the petition. The High Court retained the petition but returned the four copies to the petitioner. As the returned candidate had not complied with r 10, the petitioner attempted to effect service of the petitioner by way of an advertisement in *The Star* newspaper on 21 and 22 February 2000. The respondents tried to obtain a copy of the petition from the High Court registry by 25 February 2000 but were informed that the petitioner had not left any copies to be given to the respondents. The High Court registry duly informed the petitioner about the absence of the copies in the court file and was furnished with copies of same though it was after the expiry of the 15-day period. The respondents thus filed this motion

A to have the petition dismissed on the ground that there was no proper service.

Service of election petitions is governed by rr 10 and 15 ('r 15') of the Rules. They read as follows:

B Rule 10

> Any person returned may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him, appointing an advocate to act for him in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within Malaysia at which notices addressed to him may be left. Every such writing shall be stamped with the duty payable thereon under
C the law for the time being in force.

Rule 15

> Notice of the presentation of a petition, accompanied by a copy thereof, shall, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by
D delivering the notice and copy aforesaid to the advocate appointed by the respondent under r 10 or by posting the same in a registered letter to the address given under r 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by a notice published in the *Gazette* or in a newspaper circulating within the
E constituency or electoral ward in which the election was held, or posted on the notice board of the High Court in the State in which that constituency or electoral ward is situated, stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar.

F I had the occasion to consider the manner in which election petition jurisdiction should be exercised in *Dr Lee Chong Meng v Returning Officer, Abdul Rahman bin Haji Abdullah & Ors (Election Petition No PP-1-2000) (No 1)*. I referred to cases such as *Ponnuswami v Returning Officer, Nammakkal Constituency* [1952] SCR 218, *Harcharan Singh v Mohinder Singh* AIR 1968 SC 1500, *Tengku Korish v Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6 and *Hugh Siak Meng & Anor v Daing Ibrahim* (1975) 4 MC
G 275 to conclude that it is well-established that the right of a person to file an election petition is derived from a specific statute relating to elections and that any procedure laid down by such a special statute shall be strictly adhered to. I also ruled that resort may not be had to the Rules of the High Court 1980 ('the RHC') in dealing with the practice and procedure
H regulating election petitions. It is against this background that I considered the effect of rr 10 and 15 in that case. As I said at p 9 of the judgment:

> These two rules deal with service of an election petition. It will be observed that r 10 deals only with returned candidates. The first sentence of r 15 relates to the period within which the petition must be served. Thereafter the rule prescribes the three methods of effecting such service of the petition. As r 15
I must be read with r 10, the 'respondent' referred to in the former rule must also refer to returned candidates. It is therefore clear that r 15 is only confined to service on returned candidates. The result is that service on a person other

> than a returned candidate cannot be done as stipulated in r 15. The provisions of the RHC cannot be invoked to facilitate service of a petition on persons other than returned candidates as it does not apply to election petitions. The position therefore is that the election laws, which must be strictly adhered to, do not contain provisions regulating service of an election petition on persons other than returned candidates.

It is therefore clear that r 15 is only confined to service of election petitions on returned candidates with the result that the argument of the first and second respondents that there has been no compliance with r 15 in the service of the petition on them does not merit consideration. Following my judgment in *Dr Lee Chong Meng* where I had ruled that the Election Commission and a returning officer are not proper and necessary parties to an election petition I struck out the first and second respondents as parties.

With regard to the third respondent, the issue for deliberation is the effect of a failure by the petitioner to leave a copy of the petition with the court to be handed to the third respondent after he had published the notice stating that the petition has been presented. There was no dispute by the parties that it is the responsibility of the petitioner to leave a copy of the petition with the court. What became an issue was whether the petitioner had discharged his responsibility by filing the four additional copies of the petition even though they were returned to him by the court. In his submission before me, learned counsel for the third respondent contended that the petitioner ought to have left a copy of the petition with the court for collection by his client. He said that the court cannot be faulted for returning the four copies of the petition to the petitioner as it was the responsibility of the petitioner to ensure that a copy is left with the court for the purpose of service. He then referred to r 3(2) ('r 3(2)') of the Rules which reads as follows:

> There shall also be left with the petition two copies thereof.

He said that under r 3(2) it is the responsibility of the petitioner to leave copies of the petition with the court and not for the court to retain them when they were filed. Learned counsel for the petitioner attributed the default in the court not having any copies of the petition for purposes of service to the court itself. He said that it is the fault of the court in having returned the four copies to him and that the court ought to have retained them as required by r 3(2). The fact that the court did not know the procedure is not the fault of the petitioner. He added that, in the circumstances, the petitioner cannot be faulted for the court not having a copy of the petition to be handed to the respondent. He concluded by saying that it is not necessary that the copy must be made available by the expiry of the 15-day period so long as it is available when the respondent asks for it even if it is after the period.

The initial matter for determination is the period within which the petitioner must effect service of the petition. This is answered by the first part of r 15 which provides that the petition shall be served within 15 days of the presentation of the petition. In my opinion, the prescribed period, which is mandatory following *Devan Nair v Yong Kuan Teik* [1967]

A 1 MLJ 261, applies to all the modes of service specified in r 15. Where there is personal or postal service of the petition on the respondent, the 15-day period can be computed without any difficulty. What merits consideration is the manner of computing the time period when the petitioner effects service by publishing a notice of the presentation of the petition and has left a copy of the petition with the court. If the period is to be reckoned only B when a respondent collects the copy from the court, then the 15-day period can never be achieved if a respondent fails or refuses to collect the copy of the petition from the Registrar. In that event, service of the petition can be delayed indefinitely and thereby defeat the object of dealing with election petitions expeditiously. Therefore, it is my view that the petition shall be C deemed to have been served on the respondent on the fifteenth day after presentation of the petition even though the respondent has not collected the copy. However, the deeming effect that I have referred to is subject to an important qualification which is implicit, that is to say, a copy of the petition must have been made available with the Registrar for handing over to the respondent. This is because if no copy of the petition had been left D with the Registrar by the time of the expiry of the period in question, then it would not be possible for the respondent to obtain it when he attempts to do so. That would make service of a copy of the petition on the respondent impossible. A document can be served only if it is available for service. The need to make a copy of the petition available for service therefore needs no emphasis. Thus there must be proof of the basic fact that a copy of the E petition had been left with the Registrar within the prescribed period before it can be deemed that to have been served on the respondent.

It is my view that the responsibility of ensuring that a copy of the petition is left with the court for service on the respondent is that of the petitioner even though the additional copies filed were returned to him. The F language of r 3(2) imposes a statutory obligation on the petitioner to leave two copies of the petition with the court. Rule 3(2) does not say, as correctly submitted by learned counsel for the third respondent, that the court shall retain two copies of the petition in which event it will become the responsibility of the court to do so when more than two copies are filed. The G words ' ... shall also be left ... ' in r 3(2) show that it is the obligation of the petitioner to leave the two copies with the court. In other words, it is his duty to inform the court, at the time of filing the petition, of the requirement to leave the two copies with the court. Furthermore, learned counsel for the petitioner ought to have been aware that it is the accepted practice in the courts, well-known to practitioners, that upon documents being filed in H court, the court retains the original and returns the copies to the person filing the same for purposes of service. He ought to have returned the copies to the court in view of the mandatory requirement of r 3(2). Learned counsel also ought to have been aware, when he caused the notice of presentation of the petition to be published, that the notice expressly required the respondent to obtain a copy of the petition from the court. I Clearly the court cannot provide a copy of the petition to the respondent when all the copies are with the petitioner. This at least ought to have alerted the petitioner to ensure that a copy of the petition is immediately

dispatched to the registrar for the purpose of being handed over to the respondent. The petitioner did not realize the folly of his own inaction. It follows, therefore, that the accusation by learned counsel for the petitioner that the fact that the court did not know the procedure is not the fault of the petitioner is totally ill-founded and unwarranted when, in actual fact, the person who did not know the procedure was he himself. It is unreasonable, to my mind, to look around for scapegoats to cover one's inadvertence and lack of care and attention. I was therefore of the firm view that the return of the four copies of the petition by the High Court, in the regular performance of its duties, does not absolve the petitioner of ensuring that the required number of copies are returned to the Registrar to enable the respondent to collect it. The result is that the third respondent had not been served with the petition as a copy thereof was not available at the High Court registry for collection by the third respondent at the expiry of the 15-day period. The fact that the petitioner made the copies available to the court after the expiry of the 15-day period does not cure the defect as the time period is mandatory. The court has an inherent power to dismiss an election petition which has become a nullity by failure to serve it within the prescribed time (see *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261). Accordingly, I dismissed the petition against the third respondent.

First and second respondents striked out as parties and petition against the third respondent dismissed.

Reported by Andrew Christopher Simon